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No. 94-514

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL E. GAUDIN,

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether conflicting evidence concerning the alleged materiality of false statements in a prosecution under 18 U.S.C. § 1001 must be resolved by the jury where materiality is an essential element of the offense.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED .. i

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE ISSUE OF MATERIALITY PRESENTS A "FACT-BOUND" INQUIRY 5

A. Securities Fraud 8

(1) 15 U.S.C. § 77q(a) 8

(2) Civil and Criminal Violations of the Securities and Exchange Act 10

B. Mail Fraud, Wire Fraud, and Bank Fraud 15

C. Material Misstatements or Omissions in Insurance Applications 19

II. BOTH STATE AND FEDERAL COURTS HAVE QUESTIONED, AND IN SOME CASES DISAVOWED, THE ANTIQUATED DICTUM OF SINCLAIR 21

III. CONSTITUTIONAL LIMITATIONS 27

A. The Requirements of Due Process 27

TABLE OF CONTENTS – Continued

Page

B. The Sixth Amendment Right to a Jury Trial... 30

C. The Significance of the Determination that Materiality is an Element of the False Statement Statute 34

IV. PRECEDENT AND HISTORY DO NOT JUSTIFY AN EXCEPTION TO THE HISTORIC ROLE OF THE JURY IN DECIDING ALL ELEMENTS OF A CRIMINAL CHARGE BEYOND A REASONABLE DOUBT 39

A. The Extent of Due Process Protections, and of the Sixth Amendment Right to a Jury Trial Have Evolved Substantially Since this Court's Decision in Sinclair 43

B. None of the Other Circuit Court of Appeals Decisions Seriously Considered the Constitutional Implications of Allowing the Court to Decide Materiality 47

V. CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1988) 10, 13

Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939 (3rd Cir.), *cert. denied*, 474 U.S. 935 (1985) 13

Basic Incorporated v. Levinson, 485 U.S. 224 (1988) 13

Baumgartner v. United States, 322 U.S. 665 (1944) 35

Blockburger v. United States, 284 U.S. 299 (1932) 36

Bloom v. Illinois, 391 U.S. 194 (1968) 45, 47

Burch v. Louisiana, 441 U.S. 130 (1979) 47

Cage v. Louisiana, 498 U.S. 39 (1990) 31

Carella v. California, 491 U.S. 263 (1989) .. 4, 30, 31, 47

Chapman v. California, 386 U.S. 18 (1967) 32, 33

Chiarella v. United States, 445 U.S. 222 (1980) 3, 11

Codispoti v. Pennsylvania, 418 U.S. 506 (1974) 47

Commonwealth v. McDuffee, 398 N.E.2d 463 (1979) 26

Coy v. Iowa, 487 U.S. 1012, 1017 (1988) 45

Daubert v. Dow Chemical Co., Inc., 113 S.Ct. 2786 (1993) 48

Davis v. Alaska, 415 U.S. 308 (1974) 48

Davis v. United States, 160 U.S. 469 (1895) 27

Dowling v. United States, 493 U.S. 342 (1990) 44

Duncan v. Louisiana, 391 U.S. 145 (1968) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974) 14

Francis v. Franklin, 471 U.S. 307 (1985) 29

Freidus v. United States, 223 F.2d 598 (D.C. Cir 1955) 35

Haas v. Integrity Mutual Insurance Company, 90 N.W.2d 146 (Wis. 1958) 20

Henderson v. United States, 202 F.2d 400 (6th Cir.) 18

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 3, 12

Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994) .. 43, 44

Horning v. District of Columbia, 254 U.S. 135 (1920) ... 45, 46

Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *aff'd.* in part, *rev'd.* in part on other grounds, 459 U.S. 375 (1983) 12

Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) 45

Kungys v. United States, 485 U.S. 759 (1988) ..... *passim*

Lehigh Zinc & Iron Co. v. Bamford, 150 U.S. 665 (1893) 20

Leland v. Oregon, 343 U.S. 790 (1952) 39, 44

Luria v. United States, 231 U.S. 9 (1913) 24

M'Lanahan v. Universal Insurance Co., 26 U.S. 170 (1828) 19, 20

Marshall v. Metropolitan Life Insurance Company, 90 N.E.2d 194 (Ill. 1950) 20

TABLE OF AUTHORITIES – Continued

Page

Mayflower Insurance Exchange v. Gilmont, 280 F.2d 13 (9th Cir. 1960) 20

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 36

Medina v. California, 112 S.Ct. 2572 (1992) 45

Metropolitan Life Insurance Company v. Becraft, 12 N.E.2d 952 (Ind. 1938) 20

Miller v. Fenton, 474 U.S. 104 (1985) 35

Missouri v. Hunter, 459 U.S. 359 (1983) 36

Morissette v. United States, 342 U.S. 246 (1952) ... 28, 30, 47

Mullaney v. Wilbur, 421 U.S. 684 (1975) 27, 28, 39

Nielsen v. Mutual Service Casualty Company, 67 N.W.2d 457 (Minn. 1954) 20

Paritem Singh Poonian v. United States, 294 F.2d 74 (9th Cir. 1961) 35

Patterson v. New York, 432 U.S. 197 (1977) ..... *passim*

Pence v. United States, 316 U.S. 332 (1941) 20

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 48

People v. Hedgecock, 795 P.2d 1260 (Cal. 1990) 24, 25

In Re Phillips Petroleum Securities Litigation, 881 F.2d 1236 (3rd Cir. 1989) 13

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 35

Raab v. General Physics Corp., 4 F.3d 286 (4th Cir. 1993) 13

Rock v. Arkansas, 483 U.S. 44 (1987) 48

Rose v. Clark, 478 U.S. 570 (1986) 29

TABLE OF AUTHORITIES – Continued

Page

Sandstrom v. Montana, 442 U.S. 510 (1979) ..... *passim*

Santa Fe Industries v. Green, 430 U.S. 462 (1977)..13, 14

Schad v. Arizona, 111 S.Ct. 2491 (1991) 36, 39, 44

Sinclair v. United States, 279 U.S. 263 (1929) ..... *passim*

Smith v. John Hancock Mutual Life Insurance Company, 249 F.2d 657 (5th Cir. 1957) 20

Snyder v. Massachusetts, 291 U.S. 97 (1934)..... 44

Speiser v. Randall, 357 U.S. 513 (1958)..... 44

State v. Anderson, 603 A.2d 928 (N.J. 1992).....23, 24

Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).....4, 31

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).....3, 13, 14

Ulster County Court v. Allen, 442 U.S. 140 (1979)..... 28

United Mine Workers v. Bagwell, 114 S.Ct. 2552 (1994).....47, 49

United States v. Abadi, 706 F.2d 178 (6th Cir.) *cert. denied*, 464 U.S. 821 (1983) 6, 7, 37, 48

United States v. Allen, 554 F.2d 398 (10th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977) 18

United States v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993) 7

United States v. Argentine, 814 F.2d 783 (1st Cir. 1987)..... 16

United States v. Bass, 784 F.2d 1282 (5th Cir. 1986) 17

United States v. Bessesen, 433 F.2d 861 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971)..... 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Brown, 555 F.2d 336 (2nd Cir. 1977) 8

United States v. Brown, 578 F.2d 1280 (9th Cir.), *cert. denied*, 439 U.S. 928 (1978) 10

United States v. Carpenter, 791 F.2d 1024 (2nd Cir. 1986), *aff'd.*, 484 U.S. 19 (1987)..... 9

United States v. Carroll, 582 F.2d 942 (5th Cir. 1978) ..9, 12

United States v. Charnay, 537 F.2d 341 (9th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976)..... 10

United States v. Cloud, 872 F.2d 846 (9th Cir. 1989) ...15, 16

United States v. Collatos, 798 F.2d 18 (1st Cir. 1986) 21

United States v. Corbin, 590 F.2d 398 (1st Cir. 1979) 8

United States v. Corr, 543 F.2d 1042 (2nd Cir. 1976) 14

United States. v. Corsino, 812 F.2d 26 (1st Cir. 1987) ..6, 35

United States v. Daily, 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 405 (1991).....7, 48

United States v. De Castirs, 798 F.2d 261 (7th Cir. 1986)..... 18

United States v. Dixon, 113 S.Ct. 2849 (1993) 36

United States v. Farris, 614 F.2d 634 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980) 9

United States v. Felix, 112 S.Ct. 1377 (1992)..... 36

United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994) (*en banc*) 3

United States v. Gelb, 700 F.2d 875 (2nd Cir.), *cert. denied*, 464 U.S. 853 (1983) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Goldblatt, 813 F.2d 619 (3rd Cir. 1987) 15

United States v. Greber, 760 F.2d 68 (3rd. Cir), *cert. denied*, 474 U.S. 988 (1985) 6

United States v. Gribben, 984 F.2d 47 (2d Cir. 1993) 6

United States v. Guariglia, 757 F. Supp. 259 (S.D.N.Y. 1991) 21

United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) 18

United States v. Hansen, 772 F.2d 940 (D.C.Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) 7

United States v. Hausmann, 711 F.2d 615 (5th Cir. 1983) 7

United States v. Holzer, 816 F.2d 304 (7th Cir. 1987) 16

United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979) 9

United States v. Johnson, 718 F.2d 1317 (5th Cir. 1983) 9, 17, 21

United States v. Johnson, 937 F.2d 392 (8th Cir. 1991) 7

United States v. Koonce, 485 U.S. 374 (8th Cir. 1973) 6

United States v. Koss, 506 F.2d 1103 (2nd Cir. 1974), *cert. denied*, 420 U.S. 977 (1975) 10

United States v. Lemmons, 941 F.2d 309 (5th Cir.), *rehearing denied*, 948 F.2d 1287 (1991) 15

United States v. Lichenstein, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) 6, 35, 37

TABLE OF AUTHORITIES – Continued

Page

United States v. Lopez, 728 F.2d 1359 (11th Cir.) *cert. denied*, 469 U.S. 828 (1984) 7

United States v. Lovasco, 431 U.S. 783 (1977)..... 44

United States v. Martel, 792 F.2d 630 (7th Cir. 1986) 7

United States v. Mayo, 646 F.2d 369 (9th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981) 9

United States v. Medeles, 916 F.2d 195 (5th Cir. 1990) 15

United States v. Mentz, 840 F.2d 315 (6th Cir. 1988) 37

United States v. Newman, 664 F.2d 12 (2nd Cir. 1981) 10

United States v. O'Malley, 707 F.2d 1240 (11th Cir. 1983)..... 18

United States v. Persky, 520 F.2d 283 (2nd Cir. 1975).....11, 13, 37

United States v. Rodgers, 466 U.S. 475 (1984).....36, 37

United States v. Rubin, 836 F.2d 1095 (8th Cir. 1988) 9

United States v. Silvano, 812 F.2d 754 (1st Cir. 1987) 8

United States v. Staniforth, 971 F.2d 1355 (7th Cir. 1992)..... 21

United States v. Starr, 816 F.2d 94 (2nd Cir. 1987) 8

United States v. Stirling, 571 F.2d 708 (2nd Cir.), *cert. denied*, 439 U.S. 824 (1978) 9

United States v. Swearingen, 858 F.2d 1555 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1540 (1989) 15

United States v. Taylor, 693 F. Supp. 828 (N.D. Cal. 1988).....24, 25, 27

TABLE OF AUTHORITIES – Continued

Page

United States v. United States Gypsum Company, 438 U.S. 422 (1978) 28, 47

United States v. Vasilios, 598 F.2d 387 (5th Cir.), *cert. denied*, 444 U.S. 932 (1979) 9

United States v. Von Barta, 635 F.2d 999 (2nd Cir. 1980), cert. denied, 450 U.S. 998 (1981) 8

United States v. Von Dyke, 605 F.2d 220 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979) 18

United States v. Walus, 616 F.2d 283 (7th Cir. 1980) 24

United States v. Whitehorse, 807 F.2d 1426 (8th Cir. 1986) 38

Williams v. Florida, 399 U.S. 78 (1970) 41, 42, 43

In Re Winship, 397 U.S. 358 (1970) ..... *passim*

Yates v. Aiken, 484 U.S. 211 (1988) 29

Yates v. Evatt, 111 S.Ct. 1884 (1991) 28, 32, 33, 34

CONSTITUTION, STATUTES AND RULES

U.S. Constitution

Fifth Amendment 31, 48

Sixth Amendment ..... *passim*

8 U.S.C. § 1451(a) 24

12 U.S.C. § 1709-2 1

15 U.S.C. § 77q(a) 3, 8, 9

15 U.S.C. § 78j(b) 3, 10, 12

18 U.S.C. § 1001 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1014 21

18 U.S.C. § 1341 ..... 3, 17

18 U.S.C. § 1343 ..... 3, 16, 17

18 U.S.C. § 1344 ..... 3, 15, 17

18 U.S.C. § 2314 ..... 10, 17

17 C.F.R. § 240.10b 3, 10, 11

Fed. R. Evid. 106 48

MISCELLANEOUS

Annotation, *False Statement by Insurance Applicant*, 66 A.L.R.3d 749 (1975) 21

Annotation, *Materiality of False Statements by Applicant for Automobile Insurance as to License Revocations or Suspensions or Traffic Violations*, 89 A.L.R.2d 1028 20

4 W.P. Blackstone, *Commentaries* * 350 40

2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990) 3, 8, 11, 15, 18, 21

W. Forsyth, *History of Trial by Jury*, 235 (Morgan Ed. 1875) 41

Sand, *Modern Federal Jury Instructions*, ¶ 48.02, pp. 48-13 -48-14 21

STATEMENT

Respondent Gaudin was a real estate developer who purchased rental housing, renovated it, and sold it to buyers who utilized loans insured by the Federal Housing Administration (FHA), an entity within the Department of Housing and Urban Development (HUD), to finance the sales. Pet. App. 52a-53a. When the mortgage company discovered that Gaudin had numerous outstanding loans, it terminated all of his financing and forced him into default on 29 of the properties. He continued to collect rents and applied the proceeds to make payments on as many mortgages as he could, for taxes and capital improvements on other HUD financed houses. Pet. App. 54a-57a.

Gaudin was charged in Counts 2-17 and 19-42 with making material false statements on HUD-1 settlement forms in connection with the mortgages. The HUD-1 settlement form is typical of those used in real estate closings, and it contains a box for an entry of the amount due either "to" or "from" the borrower on line 303 of the form. The false statement charges in counts 2-17 and 19-42 were based upon the fact that respondent Gaudin, and not the buyer, either paid or received the indicated cash balances on line 303, although the amounts involved were fairly small, ranging from $31 to several thousand dollars. Counts 44-46 of the Indictment charged additional false statement violations based on allegedly inflated appraisals used to obtain financing for some of the subject properties. Pet. App. 3a-5a. Count 1, charging equity skimming in violation of 12 U.S.C. § 1709-2, was affirmed below, and is no longer at issue. Pet. App. 22a.

There was a genuine factual dispute at trial regarding the significance to FHA of the identity of the person paying or receiving the balance on line 303, and two counts (18 and 43) were dismissed for insufficient evidence. Pet. App. 53a. The Ninth Circuit noted in its decision that "[i]t appears quite doubtful from the format of the form and the certification on the form that it was designed to ferret out situations where the buyer might be serving as a stand-in for the seller or another person and did not intend to keep the house. . . . This surely

leads to a legitimate factual inquiry as to whether FHA officials pay any attention at all to line 303 of the HUD-1 form in their determination to insure the loan." Pet. App. 5a. Testimony was necessary at trial "to show that the block checked on line 303 was of any significance. Testimony was, indeed, taken from FHA officials to establish that factual contention." *Ibid.*

At the conclusion of the trial, the district court instructed the jury, as a separate element of the false statement charges under 18 U.S.C. § 1001, that the Government must prove "[t]hat the statement was material to the activities or decisions of the United States Department of Housing and Urban Development acting through the Federal Housing Administration." J.A. 22-23. However, the court removed this essential element from the jury's consideration by further instructing:

> With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

J.A. 24, 29.

On appeal, a panel of the Ninth Circuit reversed defendant's false statement convictions, holding that materiality is an essential element of false statement prosecutions under 18 U.S.C. § 1001, and it must therefore be decided by the jury. Pet. App. 57a-58a. The Government's Petition for Rehearing En Banc was granted, and the Ninth Circuit reaffirmed its holding that materiality under the false statement statute is an issue that must be decided by the jury because it is an essential element included within the definition of the offense. Pet. App. 10a-12a. The court reasoned: "We frequently submit far more complex questions to juries and have found through the centuries that they do quite well. The Sixth Amendment reflects a conscious judgment of the Framers to

interpose a jury between the judge and the accused to determine the facts necessary to find the accused guilty." Pet. App. 14a. The court also determined that "such an error cannot be harmless." Pet. App. 19a.

SUMMARY OF ARGUMENT

The Government's primary argument – that materiality is a question of law, and judges decide questions of law, ergo judges must decide materiality – is a simplistic syllogism that suffers from a defective major premise, for the record in this and similar cases demonstrates that "materiality" is essentially a "fact-bound" inquiry, well within the ability of jurors to decide the issue, as the Ninth Circuit observed in its opinion below. *United States v. Gaudin*, 28 F.3d 943, 950 (9th Cir. 1994) (*en banc*); Pet. App. 17a.

The issue of "materiality" turns on whether a false statement "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771 (1988). In other contexts indistinguishable from false statement prosecutions, the issue of materiality is decided by the jury based on well established instructions that a statement is "material" if it "would be of importance to a reasonable person in making a decision about a particular matter or transaction." 2 E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990) (hereinafter "Devitt, Blackmar & O'Malley"). This Court and numerous others have required the jury to decide the issue of materiality under similar civil and criminal statutes, such as mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and the various securities fraud statutes (15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. § 240.10b-5). *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449-453 (1976). There is no rational reason to treat the issue differently for purposes of the false statement statute.

Further, the Due Process Clause and Sixth Amendment both require that the issue of materiality be decided by the jury, based on proof beyond a reasonable doubt. The Government concedes, as it must, that materiality is an essential element of the false statement statute, 18 U.S.C. § 1001, but argues it "is no different from other legal issues – for example, the admissibility of evidence – that are entrusted to the court and often require the assessment of facts." Government's Brief at 10-11.

However, the Government's attempt to equate threshold legal questions concerning the admissibility of evidence with proof of an essential element of a criminal charge violates the due process mandate of *In Re Winship*, 397 U.S. 358, 364 (1970), that the jury in criminal cases must be satisfied by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."

This Court has often made clear that the removal of any element of a criminal charge from the jury's consideration violates not only the *Winship* due process mandate, but also " 'invade[s] [the] fact-finding function' which in criminal cases the law assigns solely to the jury," *Carella v. California*, 491 U.S. 263, 268 (1989) (*per curiam)* (Scalia, J., concurring). Such an error creates "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards". *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2083, (1993). The Government's argument disregards the constitutional difference between the respective roles of judge and jury, which has never allowed a trial judge to direct a verdict on any essential element of a criminal offense. *Carella*, 491 U.S. at 268 (Scalia, J. concurring) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977)).

Thus, where Congress has designated materiality as an essential element of a criminal charge – as it clearly has with the false statement statute, 18 U.S.C. § 1001 – basic constitutional principles of the Due Process Clause and the Sixth Amendment "truth-finding task assigned solely to juries in criminal cases" require that the jury decide the issue. *Carella*, 491 U.S. at 265.

ARGUMENT

I. THE ISSUE OF MATERIALITY PRESENTS A "FACT-BOUND" INQUIRY

As the Ninth Circuit observed, there is nothing novel about allowing juries to decide whether a false statement was material:

> The case before us is an excellent illustration of why materiality under a section 1001 charge is a "fact-bound" inquiry. One cannot look at a particular law or a particular statute or regulation to determine what would affect the decision of HUD to insure an FHA loan. False statements of age, address, gaps in employment history, or inaccuracies in a financial statement may be of no importance to some agency determinations but crucial to others.
>
> In Gaudin's case, the charges in Counts 2-17 and 19-42 involve merely checking a block on line 303 of a settlement statement that indicated that the borrower, rather than Gaudin, was paying or receiving the balance of the charges on settlement. Some of the amounts written on line 303 were trivial. For example: Count 11, $94.11; Count 12, $122.61; Count 13, $31.07; Count 28, $129.93; Count 31, $91.83. It was necessary to take testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan.
>
> The jury is the finder of fact and is entitled to believe or disbelieve the testimony of the department officials. A persuasive factual argument could be made that there was a reasonable doubt as to whether the particular block checked on line 303 would have tended to influence the agency's decision.

28 F.3d at 950, Pet. App. 17a.

Even this Court's formulation of the test of materiality suggests it is a factual inquiry:

> The *Chaunt* formulation . . . does not necessarily facilitate judgment in the infinite variety of other factual patterns that may emerge. . . . We think it is safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision.

Kungys v. United States, 485 U.S. at 771. Cf. *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.) *cert. denied*, 464 U.S. 821 (1983) ("the materiality of a statement rests upon a factual evidentiary showing") (quoted in *Kungys*, 485 U.S. at 772); *United States v. Koonce*, 485 U.S. 374, 380 (8th Cir. 1973) ("the question of materiality is one of law for the courts to decide. The proper determination of the question, however, is essentially a factual matter . . . "); *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) ("Materiality rests upon a factual evidentiary showing by the prosecution.").[1]

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[1] The decisions of the other circuits holding that the judge should decide the issue of materiality under 18 U.S.C. § 1001 similarly involve factual decisions, easily within the ken of jurors to decide. See *United States. v. Corsino*, 812 F.2d 26, 31 (1st Cir. 1987) (forged signatures on audit list to verify receipt of HUD funds held to be material because "[t]he jury could find, as we have said, that the purpose of sending the signatures to HUD was to make that agency believe that those people had actually verified receipt of the benefits."); *United States v. Gribben*, 984 F.2d 47, 50-52 (2d Cir. 1993) (police lied to prosecutor and grand jury that suspect's gun was retrieved from waistband, not from a closed bag, held to be material because "if Gribben had reported from the start . . . that handgun had been retrieved from a bag and not from Calhoun's waistband, prosecutors may have decided not to pursue the case."); *United States v. Greber*, 760 F.2d 68, 70-73 (3rd. Cir), *cert. denied*, 474 U.S. 988 (1985) (Medicare "claim forms representing that the Holter-monitors had been operated for eight hours or more when in fact the devices had been used for a much shorter time" held to be material because "Medicare required at least eight

In other contexts, both civil and criminal, where a charge or claim requires proof of a material misstatement or omission, the jury routinely decides the issue of materiality along with every other element. There is simply no rational basis to distinguish the jury's role in deciding materiality under those statutes from precisely the same kinds of questions presented by prosecutions under 18 U.S.C. § 1001.

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hours of operation to qualify for payment."); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1090, 1095 (4th Cir. 1993) (back-dated documents and false statement that contract had been performed prior to embargo on trade with Iraq held to be material for purpose of obtaining license from United States Treasury Department necessary to recover $200,000.00.); *United States v. Hausmann*, 711 F.2d 615, 618 (5th Cir. 1983) (presentment of false receipts in order to obtain disaster relief loan held material because "disbursement was dependent on proof that purchases had in fact been made. Had Hausmann not presented the false receipts, he would have received no money."); *United States v. Abadi*, 706 F.2d at 180 (osteopathic physician convicted for "false statements to the Medicaid program by billing for spinal manipulations which he had not performed."); *United States v. Martel*, 792 F.2d 630, 633, 637 (7th Cir. 1986) (defense contractor convicted for "false billing statements and receiving money for labor that was 'not performed as stated.' "); *United States v. Johnson*, 937 F.2d 392, 396-397 (8th Cir. 1991) (Air Force contract bid to replace damaged windows held *not* to be materially inflated when neither bidder nor Air Force knew exactly how many of the damaged windows could be reused); *United States v. Daily*, 921 F.2d 994, 997, 1004-1006 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 405 (1991) (false statements regarding assets and debts on loan applications); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.) *cert. denied*, 469 U.S. 828 (1984) (immigration attorney knowingly falsified "priority dates" for clients on residency applications to accelerate rulings by INS); *United States v. Hansen*, 772 F.2d 940, 949-951 (D.C.Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) (failure of Congressman to disclose loans and commodities profits on forms as required by the Ethics in Government Act of 1978 which would have – and ultimately did – prompt an investigation that concluded "the transactions violated House rules.").

A. Securities Fraud

(1) 15 U.S.C. § 77q(a)

The crime of securities fraud requires proof, among other elements, that the defendant "obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2). Accordingly, the issue of materiality under this section of the statute is a specific element of the crime that must be decided by the jury. *See* 2 Devitt, Blackmar & O'Malley, § 52.03.[2]

The pattern jury instruction defining materiality for purposes of securities fraud reads as follows:

> If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a "material" fact or a "material" omission under the evidence received in this case.
>
> In order for you to find a "material" fact or a "material" omission, the Government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to cause or to induce a person to act [to invest] or to cause or to induce a person not to act [not to invest].
>
> The securities fraud statute under which Count ___ of the indictment is brought is concerned only

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[2] As with the false statement statute, proof of securities fraud does not require actual reliance or resulting injury or loss to anyone. *United States v. Brown*, 555 F.2d 336, 338 (2nd Cir. 1977). *See also United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States v. Corbin*, 590 F.2d 398, 402 (1st Cir. 1979) (actual injury need not be proven); *United States v. Starr*, 816 F.2d 94, 98 (2nd Cir. 1987); *United States v. Gelb*, 700 F.2d 875, 880 (2nd Cir.), *cert. denied*, 464 U.S. 853 (1983); *United States v. Von Barta*, 635 F.2d 999, 1006, n.14 (2nd Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

> with such "material" misstatements or such "material" omissions and does not cover minor, or meaningless, or unimportant ones.

Id., § 52.14.

Examples of material misrepresentations, all of which present a question for the jury in securities fraud prosecutions, are conceptually and analytically indistinguishable from those at issue in this case. They include the creation of fictitious land purchase agreements (similar to the "straw-buyers" in this case) and concealment of purchaser defaults in *United States v. Farris*, 614 F.2d 634, 637 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); the failure to notify investors when a change in the nature of the investment enhanced the risk of loss in *United States v. Jensen*, 608 F.2d 1349, 1354 (10th Cir. 1979); false and misleading fiscal data on a corporate financial statement in *United States v. Vasilios*, 598 F.2d 387, 392 (5th Cir.), *cert. denied*, 444 U.S. 932 (1979); concealing the names of the true majority stockholders and misrepresenting the actual uses of proceeds of the sale of stock in *United States v. Carroll*, 582 F.2d 942, 946 (5th Cir. 1978); inflating reported earnings coupled with the concealment of adverse financial information in *United States v. Stirling*, 571 F.2d 708, 714 (2nd Cir.), *cert. denied*, 439 U.S. 824 (1978); *United States v. Rubin*, 836 F.2d 1095, 1103 (8th Cir. 1988); and *United States v. Mayo*, 646 F.2d 369, 371 (9th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981).

In *United States v. Jensen*, 608 F.2d at 1353, the court reasoned that criminal securities fraud violations under 15 U.S.C. § 77q(a)(2) required the government to prove "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading", and found this to be "a fact question" which had appropriately been decided by the jury. *Accord: United States v. Carpenter*, 791 F.2d 1024, 1031-1032 (2nd Cir. 1986), *aff'd.*, 484 U.S. 19 (1987) (misappropriating "material non public information" from *Wall Street Journal*); *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983) (*en banc*) (question whether a gold certificate was a "security" in prosecution

under 18 U.S.C. § 2314 must be decided by jury); *United States v. Koss*, 506 F.2d 1103 (2nd Cir. 1974), *cert. denied*, 420 U.S. 977 (1975) (failure to disclose material information); *United States v. Bessesen*, 433 F.2d 861, 864 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) (jury could find a "misleading concealment of a material fact" from failure to advise prospective purchasers of earlier cease and desist order); *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976) ("Failure to disclose that market prices are being artificially depressed operates as a deceit on the market place and is an omission of a material fact."); *United States v. Brown*, 578 F.2d 1280, 1283-1284 (9th Cir.), *cert. denied*, 439 U.S. 928 (1978) (statute requires "untrue statements of material facts or the omission to state material facts, the omission of which makes statements made misleading").

(2) Civil and Criminal Violations of the Securities and Exchange Act.

The Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 (Rule 10b-5),[3] similarly contains a requirement of materiality with regard to both "untrue statements" and the omission of "a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading."[4]

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[3] "Rule 10b-5 . . . declares that, in connection with the purchase or sale of any security, it shall be 'unlawful for any person, directly or indirectly,' (1) 'To employ any device, scheme, or artifice to defraud,' (2) 'To make any untrue statement of a material fact' or to omit to state a material fact so that the statements made 'in the light of the circumstances,' are misleading and (3) 'To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.' " *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1988). *See* 17 C.F.R. § 240.10b-5.

[4] Both civil and criminal actions may be brought under the provisions of Rule 10b-5. *United States v. Newman*, 664 F.2d 12, 16 (2nd Cir. 1981).

17 C.F.R. § 240.10b-5(b). Accordingly, the issue of materiality is specifically included in the instructions to the jury for criminal prosecution under this statute. 2 Devitt, Blackmar & O'Malley § 52.07.[5]

In *Chiarella v. United States, supra,* a criminal case brought under § 10(b) and Rule 10b-5, "the jury was instructed that the petitioner employed a scheme to defraud if he 'did not disclose . . . material non-public information in connection with the purchases of the stock.' " *Id.* at 236. This Court concluded:

> The jury instructions demonstrated that petitioner was convicted merely because of his failure to disclose material, non-public information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers.

Ibid.[6]

In *United States v. Persky,* 520 F.2d 283 (2nd Cir. 1975), a criminal prosecution under section 10(b) and Rule 10b-5, the Court rejected a vagueness challenge to the "general terms" of the statute and rule, finding that a "reasonable

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[5] Related pattern jury instructions similarly require the jury to decide the issue of materiality under other provisions of securities laws. The phrase "any manipulative or deceptive device or contrivance," is defined in jury instructions as "the deliberate omission of a material fact with the knowledge that the omission makes the facts, as represented, false." 2 Devitt, Blackmar & O'Malley, § 52.09. The term "deception" is similarly defined as "to defraud by deliberately making an affirmative misstatement of a material fact." *Ibid.* The term "manipulative or deceptive device" is defined as "a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact." *Ibid.*

[6] The Court reversed Chiarella's conviction because the defendant, as an employee of a printing company where prospectuses for corporate takeovers were produced, had none of the duties of a broker, and "[w]hen an allegation of fraud is based upon non-disclosure, there can be no fraud absent a duty to speak." *Id.* at 235.

citizen" would have no difficulty interpreting terms such as "material fact" or "any omission to state a material fact":

> While it is true that the language of [the section] uses general terms, its provisions, while perhaps falling short of the standards of immutability followed by the laws of the Medes and the Persians, are definite enough according to the canons of Anglo-American law.
>
> Subjecting the words . . . to critical scrutiny, we find no fatal ambiguity or indefiniteness . . . No honest and reasonable citizen could have difficulty in understanding the meaning of "untrue," "material fact," "any omission to state a material fact," "in light of the circumstances under which they were made," or "misleading." All these terms, it is true, call for interpretation in accordance to the facts of a given case.

Id., at 287 quoting *Coplin v. United States*, 88 F.2d 652, 657 (9th Cir.), *cert. denied*, 301 U.S. 703 (1937). In *United States v. Carroll*, 582 F.2d at 946, the material misstatements included misrepresentations of the identity of major stockholders, the court finding that "[i]t was not unreasonable for the jury to find the defendants guilty as charged . . . At least one investor testified that he purchased shares in the mining company in reliance on that representation." *Id.* at 946. In this case, the false statements similarly pertained to the identity of the person paying sometimes trivial amounts of closing costs.

In its civil applications, section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), again requires the jury to find that the defendant misstated or omitted a "material fact." In *Herman & MacLean v. Huddleston, supra*, "the District Judge submitted the case to the jury on special interrogatories relating to liability" and "also instructed the jury to determine whether plaintiffs had proved their cause of action by a preponderance of the evidence." *Id.* at 378-379. Those interrogatories included the question "whether the prospectus was materially misleading and, if so, whether this was done with scienter of various defendants." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 539 (5th Cir. 1981), aff'd.

in part, rev'd. in part on other grounds, 459 U.S. 375 (1983). According to the opinion of the Fifth Circuit Court of Appeals:

> The jury found that the prospectus was materially misleading as to the cost of constructing the speedway and that the defendants had "failed to disclose" the true facts with reckless disregard for the truth. The trial judge then himself determined the amount of damages . . .

640 F.2d 539-40 (footnote setting forth the jury's detailed findings omitted). *Accord: Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 942-943 (3rd Cir.), *cert. denied*, 474 U.S. 935 (1985); *In Re Phillips Petroleum Securities Litigation*, 881 F.2d 1236, 1244 (3rd Cir. 1989).

As with this Court's definition of "materiality" in *Kungys*, the various formulations of deceit under the securities fraud statute encompass practices "that are intended to mislead investors." *Santa Fe Industries v. Green*, 430 U.S. 462, 476 (1977). *Accord: Basic Incorporated v. Levinson*, 485 U.S. 224, 239 (1988) ("[w]hether merger discussions in any particular case are material therefore depends on the facts", which must be weighed by the "factfinder"; thus, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information."); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. at 153-154 ("positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." (Numerous citations omitted.)); *United States v. Persky*, 520 F.2d at 288; *Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993) (" 'Soft,' 'puffing' statements such as these generally lack materiality because the market price of a share is not inflated by vague statements predicting growth.").

In *TSC Industries, Inc. v. Northway, Inc., supra*, the Court further clarified this test:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. . . . The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment.

Id. at 450 (footnote and citations omitted). In a footnote accompanying the text quoted above, the Court analogized the jury's role in deciding materiality to "the jury's unique competence in applying the 'reasonable man' standard . . . in negligence cases." *Id.* at 450, n. 12 (citation omitted). After reviewing the evidence of materiality, the Court concluded: "These are questions we think best left to the trier of fact." *Id.* at 460.

And so it should be with 18 U.S.C. § 1001, a generic false statement statute with none of the complexities of securities trading. The determination of materiality in the fraud context often involves complex "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Industries, Inc. v. Green*, 430 U.S. at 476 (citations omitted). *Accord: Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168 (10th Cir. 1974) ("churning"); *United States v. Corr*, 543 F.2d 1042, 1045-1046, nn. 4, 5, 6, 7 (2nd Cir. 1976) ("wooden tickets," "parking," "box in the stock," and "directed orders"). Thus, the determination of materiality in securities fraud cases is far more complex, and arguably presents a more technically difficult question than the typical false statement prosecution, yet it is routinely decided by the jury.

B. Mail Fraud, Wire Fraud, and Bank Fraud

In *United States v. Swearingen*, 858 F.2d 1555, 1556-1557 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1540 (1989), the Eleventh Circuit held that the Government must prove a "scheme by means of false pretenses, representations, and promises which were material" as an element of bank fraud prosecutions under 18 U.S.C. § 1344.[7] The pattern jury instruction defining "any scheme or artifice to defraud" makes repeated reference to "material" facts or omissions, and defines "[a] material fact" as "a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction." 2 E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990).

In *United States v. Cloud*, 872 F.2d 846, 850 (9th Cir. 1989), the court required proof of "material, false statements or representations" as an element of bank fraud (citing *United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir. 1987)).[8] In *Cloud*, as in this case, proof of a "material misrepresentation" on a closing statement was utilized to prove the offense. *Id.*, at 851. The court noted the importance of the bank's "reliance on false representations made by Cloud" because witnesses from the bank "testified that the escrow never would have closed, and that the Hibernia funds would not have been dispersed, if Cloud had objected to the misstated information or declined to sign the escrow instructions." *Id.*, at 852, n. 6.

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[7] The bank fraud statute creates two offenses, the second of which requires "false or fraudulent pretenses, representations, or promises" to obtain monies, funds, credits, assets, securities or other property of or under control of the financial institution. *United States v. Medeles*, 916 F.2d 195, 198-199 (5th Cir. 1990). A financial institution need not actually suffer a loss, but need only be placed at risk. *United States v. Lemmons*, 941 F.2d 309, 312 (5th Cir.), *rehearing denied*, 948 F.2d 1287 (1991).

[8] In *Goldblatt*, the court instructed the jury that it must find "the scheme by means of false pretenses, representations and promises which were material," and also instructed that "a misrepresentation would be 'material' if it went to the heart of the refund transaction." 813 F.2d at 623.

Accordingly, the court found "[t]here was evidence before it from which the jury could infer that Cloud made a calculated decision to sign the instructions in order to obtain his share of the loan proceeds, knowing that the bank could be deceived by materially false statements that appeared on the face of the instructions." *Ibid.* Thus, the question of "materially false statements" in *Cloud* was factually and legally indistinguishable from the same question presented in this case where Gaudin allegedly made false statements on settlement statements to induce FHA loans.

In *United States v. Argentine*, 814 F.2d 783 (1st Cir. 1987), a wire fraud prosecution brought under 18 U.S.C. § 1343, the court reversed defendant's convictions because of the trial court's determination, as a matter of law, that his dealings were "fraudulent." The Court noted that "the evidence may not have been directly contradicted by conflicting evidence" but held:

> it is nonetheless settled, in a criminal case, that "[t]he plea of not guilty places every issue in doubt, and not even undisputed facts may be removed from the jury's consideration, either by direction or by omission in the charge." (Citations omitted.)
>
> * * *
>
> The Constitution casts judge and jury in mutually supporting – yet nevertheless distinct – roles. Undeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution "regardless of how overwhelmingly the evidence may point in that direction. The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977).

Id. at 788. *Cf. United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987) (Posner, J.) ("Fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears in the statute, *see United States v. Dial*, 757 F.2d 163,

168 (7th Cir. 1985) – includes the deliberate concealment of material information in a setting of fiduciary obligation"); *United States v. Bass*, 784 F.2d 1282, 1284-1285 (5th Cir. 1986) (reversible error in violation of *Winship* to instruct jury that defendant was "employee" in prosecution for submitting false or fraudulent W-4 forms, 26 U.S.C. § 7205).

Similarly, in *United States v. Johnson, supra*, the Fifth Circuit sitting *en banc* declined to extend the dictum of *Sinclair v. United States*, 279 U.S. 263 (1929), to a prosecution for interstate transportation of a falsely made securities in violation of 18 U.S.C. § 2314. The court reversed defendant's conviction because the trial judge had instructed the jury, as a matter of law, that gold certificates were securities, reasoning that "[t]he district judge was no more entitled to refuse to allow the jury to decide whether the Gold Certificate was a security than he would have been permitted to refuse to charge on whether the Certificate was falsely made or whether Johnson acted knowingly." *Id.* at 1323. Distinguishing *Sinclair*, the court discussed *Winship* and related cases (*id.*, at 1320-1324), concluding: "We are, therefore, reluctant to expand *Sinclair's* sweep at the expense of the accused's right to interpose the jury between himself and the judge." *Id.*, at 1324.

The standard instructions defining "false or fraudulent pretenses, representations, or promises" within the meaning of the three different criminal statutes for mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and bank fraud, 18 U.S.C. § 1344, all specifically require the jury, not the judge, to make the finding of materiality:

> The phrase "any scheme or artifice to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.
>
> The term "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at

> the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and later used with intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

2 Devitt, Blackmar & O'Malley, § 40.13 (4th ed. 1990).

This jury instruction, and similar instructions requiring proof of "knowing concealment of material facts" are in common usage throughout the circuits. *See, e.g., United States v. Von Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.), *rehearing denied*, 204 F.2d 126 (1953); *United States v. De Castirs*, 798 F.2d 261, 263 (7th Cir. 1986); *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981); *United States v. Allen*, 554 F.2d 398, 410 (10th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977); *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983).[9]

These cases all present questions of materiality at least as complex as those involved under the generic false statement statute, 18 U.S.C. § 1001, yet materiality is still a question for the jury under these various fraud provisions. Thus, the Government's arguments would force this Court to draw a meaningless distinction between generic, false statement

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[9] Jury instructions for the Fifth, Eighth, and Eleventh Circuits all set forth similar definitions of materiality for the jury's determination. *See* Pattern Jury Instructions of the District Judge's Association of the Fifth Circuit, Instructions Nos. 2.54 and 2.55 (1990) ("A representation may be 'false' when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud."); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.18.1341 (1989) ("A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction."); Pattern Jury Instructions of the District Judge's Association of the Eleventh Circuit, Instruction No. 34 (1985) ("A 'material fact' is a fact that would be of importance to a reasonable person in deciding whether to engage or not engage in a particular transaction.").

prosecutions under 18 U.S.C. § 1001, where the Government claims materiality is a question of law, and the materiality of false or fraudulent representations in securities regulation, wire, mail and bank fraud, where juries are routinely delegated the task of deciding the issue with no apparent difficulty.

C. Material Misstatements or Omissions in Insurance Applications.

The question of materiality in cases concerning recision of insurance coverage based on material misstatements or omissions has historically been reserved to the jury, both in England and in this country. In *M'Lanahan v. Universal Insurance Co.*, 26 U.S. 170 (1828) (Story, J.), the trial court had directed the jury to find that insurance coverage for a vessel that sank at sea was void based upon alleged, material misstatements in obtaining coverage. *Id.* at 182. The Court reversed, holding that the determination of what omissions or misstatements are material is exclusively for the jury:

> It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there can not at this time be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities), that generally, the materiality of the concealment is a question of fact for the jury.

Id. at 188. The Court noted that the English practice was the same, holding "that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." *Id.* at 191 (quoting *Maryland Insurance Company v. Ruden's Administrators*, 10 U.S. 338 (1810)).

The Court in *M'Lanahan* recognized that the "test of materiality . . . is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance. . . . Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results." *Id.* at 188-189. After discussing

both English and American cases relevant to the issue, the Court nevertheless concluded

> that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts, but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law.

26 U.S. at 191. Accordingly, the judgment was reversed. *Ibid.* *Accord*: *Pence v. United States*, 316 U.S. 332, 338 (1941) (elements of insurance fraud include "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with intent to deceive (5) with action taken in reliance upon the representation,"); *Lehigh Zinc & Iron Co. v. Bamford*, 150 U.S. 665, 672-673 (1893) (Harlan, J.).

While there is a division of authorities, courts have generally followed this rule over the 165 years since the *M'Lanahan* case, reserving for juries the issue "whether knowledge of the concealed facts would reasonably have influenced the company in accepting the risk or fixing the premium." *Mayflower Insurance Exchange v. Gilmont*, 280 F.2d 13, 16-17 (9th Cir. 1960) (numerous citations omitted).[10]

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[10] In that case, the court applied Oregon law, but relied upon numerous decisions from other jurisdictions in support of its holding that "[m]ateriality is a question of fact. It is a question for the jury when reasonable minds can differ as to its existence. *See, e.g., Haas v. Integrity Mutual Insurance Company*, 90 N.W.2d 146 (Wis. 1958); *Smith v. John Hancock Mutual Life Insurance Company*, 249 F.2d 657 (5th Cir. 1957); *Nielsen v. Mutual Service Casualty Company*, 67 N.W.2d 457 (Minn. 1954); *Marshall v. Metropolitan Life Insurance Company*, 90 N.E.2d 194 (Ill. 1950); *Metropolitan Life Insurance Company v. Becraft*, 12 N.E.2d 952 (Ind. 1938)." *Id.* at 17. *See also* Annotation, *Materiality of False Statements by Applicant for Automobile Insurance as to License Revocations or Suspensions or Traffic Violations*, 89 A.L.R.2d 1028 ("Ordinarily,

See Annotation, *False Statement by Insurance Applicant,* 66 A.L.R.3d 749, §§ 3-5 (1975).

II. BOTH STATE AND FEDERAL COURTS HAVE QUESTIONED, AND IN SOME CASES DISAVOWED, THE ANTIQUATED DICTUM OF SINCLAIR

Although the Government argues that the other circuits are unanimous in holding that the trial judge must decide the issue of materiality, some circuit courts of appeal have questioned this rule and several state courts have simply refused to follow it, despite the language from *Sinclair* and this Court's more recent dictum in *Kungys.*[11]

In *United States v. Staniforth,* 971 F.2d 1355, 1358 (7th Cir. 1992), a prosecution under 18 U.S.C. § 1014 for making false statements to a bank, Judge Posner questioned the anomaly inherent in the rule that "materiality," where an element of

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the materiality of a representation as to license revocations or suspensions or traffic violations is a question for the trier of facts. . . . The test of materiality is whether knowledge of the truth would have reasonably influenced the insurer in accepting the risk or fixing the premium.").

[11] In *United States v. Collatos,* 798 F.2d 18, 19-20 (1st Cir. 1986) the First Circuit noted: "although courts might be reluctant to 'expand *Sinclair's* sweep at the expense of the accused's right to interpose the jury between himself and the judge,' [*United States v. Johnson,* 718 F.2d at 1324], in this case – which is squarely on point with *Sinclair* – we apply its mandate . . . ". In *United States v. Guariglia,* 757 F. Supp. 259, 266 (S.D.N.Y. 1991), a perjury prosecution, the court cited Sand, *Modern Federal Jury Instructions,* ¶ 48.02, pp. 48-13 – 48-14, for the proposition that "[t]he better practice is to give the question of materiality to the jury".

Devitt, Blackmar & O'Malley, the standard source of jury instructions in federal court, makes two references to *Sinclair* with the caveat that "it should be noted, however, that *Sinclair* did not involve a prosecution for perjury or false statements and the Court's discussion of materiality in this regard is dictum." 2 Devitt, Blackmar & O'Malley, §§ 43.03, 43.07. The commentary also warns that "the most recent decision should be consulted before removing an essential element of the offense charged – particularly a controverted one – from determination by the jury." *Id.*, § 43.03.

a criminal offense, "is a question of law to be decided by the judge":

> This is more than a little puzzling. A criminal defendant is entitled to require the prosecutor to prove to the jury's satisfaction every element of the offense, *Estelle v. McGuire*, 112 S.Ct. 475, 480 (1991); *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991), and materiality, we have just seen, is one of the elements in a prosecution under section 1014.

Id. Judge Posner saw a distinction between consideration of "materiality" in perjury cases, where it is related to relevancy, and in modern statutes making material false statements to government agencies or banks a criminal offense:

> The proposition that it is a question for the judge traces back to cases involving prosecutions for perjury, e.g., *Sinclair v. United States*, 279 U.S. 263, 298 (1929), where materiality refers to the legal *relevance* of the question to the trial or investigation in which the defendant answered the question falsely, while here it refers to the factual issue of whether the false statement could have influenced the bank in making a loan. The Supreme Court applied the perjury rule to a false-statement statute (18 U.S.C. § 1001) in *Kungys v. United States*, 485 U.S. 759, 772 (1988), on the authority of *Sinclair*, without remarking the difference between that context and the one in which the rule had been developed. See *Weinstock v. United States*, 231 F.2d 699, 702-703 (D.C. Cir. 1956)
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> * * *
>
> Relevance is a legal determination. Juries are told what is relevant; they do not make determinations of relevance. But the question whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision. The distinction was overlooked in *United*

> *States v. Dailey,* 921 F.2d 994, 1004 (10th Cir. 1990), where the Tenth Circuit, which had distinguished cases based on *Sinclair* in *United States v. Irwin,* 654 F.2d 671, 677 n. 8 (10th Cir. 1981), held that *Kungys* constrained it to hold that materiality is a question of law in prosecutions under the federal false-statement statutes.

Id. (emphasis in original). However, since the issue was not before it, the court did "not attempt to resolve today the interesting issue of whether materiality in a prosecution under section 1014 is a question of fact or a question of law." *Id.*, at 1359.

Several state courts have gone further, concluding that the *Sinclair* dictum has been invalidated by *Winship* and other, more recent decisions of this Court. In *State v. Anderson,* 603 A.2d 928, 929 (N.J. 1992), the New Jersey Supreme Court observed that "[t]he few jurisdictions that have undertaken a fresh examination have concluded that the longstanding rule is fundamentally flawed, its foundation without footings." (Citations omitted) The court overruled its own precedent and disavowed *Sinclair,* because the historical view "declaring materiality to be a question of law irreconcilably conflicts with the constitutional right of an accused to have a jury determine the existence beyond a reasonable doubt of each essential element of a crime before he or she is convicted." *Id.* at 929 (citations omitted). The court reasoned that "[i]ntertwined with the right to a jury trial is the federal constitutional right to due process of law" (*id.* at 932), and concluded:

> Both the tenets of due process and the right to a jury trial mandate that here materiality, as an element of the offense of perjury, must be found beyond a reasonable doubt by the jury.

Id. at 933.

In so holding, the *Anderson* Court acknowledged this Court's dictum in *Kungys v. United States,* 485 U.S. at 772, but hesitated "to place conclusive weight behind the Court's statement in *Kungys.* We note that the statute at issue there

does not provide for a trial by jury, . . . " *Id.*[12] The court declined to follow *Kungys* "primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process issue," and the court questioned whether the Supreme Court today would "find the rule of *Sinclair* reconcilable with its construction of the fundamental right to a trial by jury." *Id.* at 933.

The *Anderson* Court offered a cogent explanation for the erroneous historical view that materiality is subject to judicial determination, theorizing that courts have confused the concept of materiality "as an initial evidentiary determination" (as the Government argues in this case), with the situation where it is an element of a criminal offense. 603 A.2d at 933-935. In the latter context, juries are perfectly capable of making this kind of determination:

> While as lawyers we are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept or removes it from the ken of a layman's discernment and determination. The word "material" and the idea of materiality are commonly understood, and every day judgments on a variety of subjects are made upon the basis of a layman's sense of materiality.

Id. at 934 (quoting *People v. Clemente*, 136 N.Y.S.2d 202, 205 (1954)).

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[12] *Kungys* involved a civil complaint brought pursuant to 8 U.S.C. § 1451(a) to denaturalize a citizen who had allegedly made misrepresentations of material facts when he applied for citizenship. Such proceedings are not criminal and do not invoke the Sixth Amendment right to a jury trial. *See Luria v. United States*, 231 U.S. 9, 27-28 (1913); *United States v. Walus*, 616 F.2d 283, 304 n. 53 (7th Cir. 1980).

This distinction was critical to the reasoning of *Anderson* and other courts that have declined to follow the dictum in *Sinclair* and *Kungys*. *See United States v. Taylor*, 693 F. Supp. 828, 839-841 (N.D. Cal. 1988); *People v. Hedgecock*, 795 P.2d 1260, 1266 (Cal. 1990).

The court in *United States v. Taylor,* 693 F. Supp. 828 (N.D. Cal. 1988), applied a similar analysis to explain the confusion that has resulted from blurring this distinction:

> A ruling by the court regarding evidence simply determines what information a jury may consider in reaching its decision regarding the elements of an offense; a ruling by the court regarding materiality precludes the jury from reaching a decision regarding that element. As the Supreme Judicial Court of Massachusetts found in *Commonwealth v. McDuffee,* 398 N.E.2d 463, 468 (1979), it is therefore questionable whether useful analogy can any longer be drawn between the determination of the relevance of evidence for purposes of admissibility and the determination of the element of materiality for purposes of perjury conviction.

693 F. Supp. at 839.

Similarly, the California Supreme Court held in *People v. Hedgecock,* 795 P.2d 1260 (Cal. 1990), that even though "in a perjury prosecution the accused historically has not been entitled to have the jury decide the question of materiality . . . 'the continuing validity of [this rule] may be doubtful in light of *In re Winship, supra*, and *Connecticut v. Johnson*, 460 U.S. 73 (1983).' " *Id.* at 1266 (quoting from *People v. Figueroa,* 715 P.2d 680 (1986)). The *Hedgecock* Court reasoned that

> the determination of materiality is not simply a question of law. Rather, it involves an evaluation of the significance of the defendant's statements or omissions, in the circumstances in which they were made. This is a task appropriately entrusted to the jury.

795 P.2d at 1267. While expressing "no view whether in perjury prosecutions based on false testimony at a judicial or legislative proceeding the question of materiality is a jury issue", the court nevertheless held "that in a perjury prosecution based on errors or omissions in disclosure statements required by the Act [the Political Reform Act of 1974, Gov. Code, § 81000 et seq.], materiality is an essential element of

the offense, and must therefore be determined by the jury." 795 P.2d 1267-1268.

In *Commonwealth v. McDuffee*, 398 N.E.2d 463 (Mass. 1979), the court reversed the defendant's conviction for perjury because the trial court instructed the jury "that the defendant's statements, contained in his application, were material as a matter of law." *Id.* a. 467. The court discussed the history of perjury prosecutions and concluded:

> Early English case law presents a split of opinion as to whether the issue of materiality should be treated as a question of law for the court's determination or a question of fact to be submitted to the jury. The controversy was set to rest in England by the Perjury Act of 1911 which provided in pertinent part, "(6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial." 1 & 2 Geo. 5, c. 6, § 1(6) (1911).

Ibid. (footnote and numerous citations omitted). The omitted footnote observed that "[t]he perjury statutes in this Commonwealth, G.L. c. 268, §§ 1-1A, contain no such provision." *Ibid.*, n. 9.

The court then discussed the history of *Sinclair* and the questionable validity of the cases cited in support of its holding, *Id.* at 468, and held:

> We see no justification for removing the issue from the jury in order to allow the trial judge to decide if there exists a sufficient connection between the purpose of the question and the object of the inquiry to warrant a finding of materiality.

Id. at 469. The court reasoned "[i]t is not beyond a layman's judgment whether the statements in question had a 'reasonable and natural tendency' to influence the pertinent determination." *Id.* at 470 (citation omitted).

Thus, the sheer weight of "precedent and history" that the Government relies upon has increasingly lost its momentum as a growing number of recent decisions re-examine the issue with more thoughtful analysis than the Circuit Court of

Appeals' decisions relied upon by the Government. *See* n. 1, *supra*.[13]

III. CONSTITUTIONAL LIMITATIONS

A. The Requirements of Due Process

The due process requirement that the prosecution bear the burden of "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged" has a long history in this Court's decisions. *In Re Winship*, 397 U.S. at 364. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Winship*, 397 U.S. at 363, quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895). *See also Davis v. United States*, 160 U.S. 469, 493 (1895), holding the prosecution must prove, beyond a reasonable doubt, "the existence of every fact necessary to constitute the crime charged," quoted in *Winship*, 397 U.S. at 363.[14]

This basic, constitutional principle has often been reaffirmed and never questioned in subsequent decisions. In *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975), the Court invalidated a Maine law requiring "a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter," as "an intolerable result," (citing *Winship*, 397 U.S. at 372 (Harlan, J., concurring)). As in this case with

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[13] Almost none of the decisions of the other circuits even mention *Winship*, much less discuss it. *See* discussion *infra*, at pp. 47-49. As the court observed in *United States v. Taylor*, 693 F. Supp. at 831, "cases generally continue simply to cite *Sinclair* and its progeny without analysis."

[14] The Government acknowledges that the due process requirement of proof beyond a reasonable doubt "is a firmly rooted principle." Government Brief at 36, n. 25.

materiality, Maine's legislative decision to place this burden on the defense was the common law practice. 421 U.S. at 694 and n. 16. Thus, "as a formal matter the absence of the heat of passion on sudden provocation is not a 'fact necessary to constitute the *crime*' of felonious homicide in Maine." *Id.*, at 697, citing *Winship*, 397 U.S. at 364 (emphasis in original). The Court nevertheless found Maine's legislative act invalid under the Due Process Clause despite the fact that "negating an argument that the homicide was committed in the heat of passion" presents "a heavy burden for the prosecution to satisfy." *Id.*, at 701. *Accord: Patterson v. New York*, 432 U.S. 197, 215 (1977) ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."); *Yates v. Evatt*, 111 S.Ct. 1884 (1991).

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court reversed petitioner's murder conviction, holding that an instruction advising the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated the due process dictates of *Winship*. 442 U.S. at 513, 520-524. The Court relied upon its decisions in *Morissette v. United States*, 342 U.S. 246, 275 (1952), and *United States v. United States Gypsum Company*, 438 U.S. 422 (1978), to invalidate this presumption, because it "would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." 442 U.S. at 523. The Court underscored this principle in *Ulster County Court v. Allen*, 442 U.S. 140 (1979):

> Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

442 U.S. at 156 (citing *Winship*, 397 U.S. at 364 and *Mullaney v. Wilbur*, 421 U.S. at 702-703, n.31.). *Accord*: *Francis v. Franklin*, 471 U.S. 307, 326 (1985) (presumption that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" violates "the wellspring due process principle" of *Sandstrom v. Montana*, *supra*); *Yates v. Aiken*, 484 U.S. 211 (1988).

In *Rose v. Clark*, 478 U.S. 570 (1986), the Court found harmless error in jury instructions that violated the principles of *Sandstrom* and *Francis v. Franklin*, but distinguished the kind of situation presented here, where:

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction."

Id., at 578 (citing *United States v. Martin Linen Supply Co.*, *supra*, 430 U.S. 564, 572-573 (1977), and *Carpenters v. United States*, 330 U.S. 395, 408 (1947)). "Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Id.* at 578.[15]

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[15] In concluding that a *Sandstrom* error is not "equivalent to a directed verdict for the State," the Court explained in a footnote: "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Id.* at 581 and n. 8, citing *Connecticut v. Johnson*, 460 U.S. 73, 95, n. 3 (1983) (Powell, J., dissenting).

This distinction would have no effect here, where the jury was never allowed to consider the issue of materiality because the trial judge – "the wrong entity" in the words of *Rose* – instructed the jury that "[t]he issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements

B. The Sixth Amendment Right to a Jury Trial.

This Court has often recognized the necessary interrelationship of the *Winship* requirement of "proof beyond a reasonable doubt," and the dictates of the Sixth Amendment that it is exclusively the role of the jury to apply this burden of proof in deciding every "fact necessary to constitute the crime with which [the defendant] is charged." *Winship,* 397 U.S. at 364. In *Morissette v. United States,* 342 U.S. at 274, the Court emphasized not only the due process presumption of innocence and burden of proof beyond a reasonable doubt, but also the essential Sixth Amendment requirement that intent, as "an ingredient of the crime charged" is "a question of fact which must be submitted to the jury." In *Sandstrom v. Montana, supra*, the Court held a presumption of intent violates both due process and also "would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." 438 U.S. at 523. *Accord*: *Carella v. California,* 491 U.S. at 265 (presumptions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases").

In his concurring opinion in *Carella*, Justice Scalia emphasized the historical significance of the "structural guarantee" that a jury decide the facts of a criminal case without any involvement by the judge:

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana,* 391 U.S. 145, 155 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.,* at 156. A defendant may assuredly insist upon observance of the guarantee even when the evidence against him is so overwhelming as to

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charged in the indictment are material statements." J.A. 24, 29 (Court's instructions to the jury).

> establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

491 U.S. at 268 (Scalia, J., concurring). Justice Scalia's concurrence noted the importance of the jury's involvement in resolving all factual questions, regardless of the weight of the evidence:

> In other words, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States,* 326 U.S. 607, 614 (1946). "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock,* 474 U.S. 376, 384-385 (1986).

Id. at 269 (Scalia, J., concurring).

In *Sullivan v. Louisiana, supra,* this Court unanimously reversed the petitioner's first degree murder conviction because of a defective reasonable doubt instruction, which had been held unconstitutional in *Cage v. Louisiana,* 498 U.S. 39 (1990) (*per curiam*).[16] The Court again recognized the interrelationship between the due process reasonable doubt requirement and the Sixth Amendment right to have a jury decide every fact necessary for conviction:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 113 S.Ct. at 2081.

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[16] In *Cage,* the defective instruction was held to violate the dictates of *In Re Winship, supra,* because it defined reasonable doubt as a "substantial" or "grave" doubt, which the Court held to "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41.

The importance of the Sixth Amendment right to a jury creates an analytical distinction between "trial errors," based on due process violations where harmless error analysis is applicable; and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" of *Chapman v. California,* 386 U.S. 18 (1967). *Sullivan,* 113 S.Ct. at 2082 (quoting *Arizona v. Fulminante,* 499 U.S. 279 (1991)). A defective reasonable doubt instruction creates a structural error that is not subject to harmless error analysis, because the Sixth Amendment right to have a jury resolve all issues of guilt is

> a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose v. Clark,* 478 U.S. 570, 577 (1986). The right to trial by jury reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana,* 391 U.S., at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 113 S.Ct. at 2083.[17]

The holding in *Yates v. Evatt,* 111 S.Ct. 1884 (1991), a presumption case, is indicative of this Court's uncompromising view of the Sixth Amendment requirement that the jury pass judgment on all facts in a criminal case. There, the Court

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[17] The Government asserts that the Ninth Circuit's recognition of a relationship between due process and the right to have a jury decide all elements of a crime "erroneously conflated the two requirements in an attempt to justify its refusal to follow *Sinclair* in light of the 'later pronouncements in *Winship* through *Sullivan.*' " Government's Brief at 37, citing Pet. App. 16a, 28 F.3d at 950.

Quite to the contrary, the Ninth Circuit opinion simply recognized the necessary connection between these two constitutional imperatives, a connection often recognized by this Court as dictated by the structural role of the jury in applying the burden of proof beyond a reasonable doubt to all facts necessary for conviction.

held that the South Carolina Supreme Court's application of the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967), was erroneously based on the question whether "the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect." 111 S.Ct. at 1895. This approach "does not satisfy all of *Chapman's* concerns" because:

> [T]he enquiry will not tell us whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict obtained. Because the State Supreme Court's standard of review apparently did not take these latter two issues into consideration, reversal is required.

Ibid. It is significant to the issues presented in this case that the *Yates* analysis required the Court to take "two quite distinct steps," both of which hinged on "what evidence the jury actually considered" regarding the affected element of the offense. *Id.* at 1893.

The concurring opinion by Justice Scalia, joined by Justice Blackmun, emphasizes that the Court's analysis requires reversal unless the record proves that the jury actually did find all the elements of the offense beyond a reasonable doubt without reliance on an evidentiary presumption:

> Given the nature of the instruction here, then, to determine from the "entire record" that the error is "harmless" would be to answer a purely hypothetical question, viz., whether, if the jury *had been* instructed correctly, it *would have* found that the state proved the existence of malice beyond a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harmless-error standard announced in *Chapman v. California*, 386 U.S. 18, 24 (1967) and reiterated by the Court today. "[T]he issue under *Chapman* is whether the jury *actually rested* its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of

> the presumption." Ante, at 1893 (emphasis added). *See also Bollenbach v. United States*, 326 U.S. 607, 614 (1946) ("the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials"). While such a hypothetical inquiry ensures that the State has, in fact, proved malice beyond a reasonable doubt, it does not ensure that it has proved that element beyond a reasonable doubt *to the satisfaction of a jury.*

Id. at 1898 (emphasis in original). In this case, it is clear that the jury was directed to find the element of materiality without considering any of the relevant evidence:

> With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

J.A. 24, 29 (Court's instructions to the jury).

The holding of *Yates* underscores the singular importance of the jury determination of all facts in a criminal case, and would negate any possibility of finding harmless error on this record, where the trial court directed a verdict on the element of materiality, thus precluding the jury from considering any evidence in deciding the issue.

C. The Significance of the Determination that Materiality is an Element of the False Statement Statute.

Whenever an issue is an essential element of a criminal offense, constitutional principles of due process and the right to a jury trial must take precedence over the strained evidentiary distinction between issues of fact and law that form the

basis of all the Government's arguments for reversal in this case.[18]

Nearly all courts that have considered the issue have held "materiality" to be an essential element of each clause within the false statement statute, 18 U.S.C. § 1001. *See, e.g., United States v. Corsino,* 812 F.2d 26, 30 (1st Cir. 1987); *United States v. Lichenstein,* 610 F.2d at 1278; *Paritem Singh Poonian v. United States,* 294 F.2d 74, 75 (9th Cir. 1961); *Freidus v. United States,* 223 F.2d 598, 601 (D.C. Cir 1955). Accordingly, the Government concedes that the false statement statute has "long been interpreted to contain an implicit requirement of materiality." Government's Brief at 11.

In *Patterson v. New York, supra,* the Court explicitly held that the prosecution must "prove beyond a reasonable doubt all of the elements included in the *definition* of the offense of which the defendant is charged." 432 U.S. at 210 (emphasis added). The term "materiality" was specifically included by Congress in the definition of the false statement statute:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent

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[18] This Court has noted that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton,* 474 U.S. 104, 113 (1985) (citations omitted). Moreover:

> an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question- . . . . Perhaps much of the difficulty in this area stems from the practical truth that the decision to label and issue a "question of law" a "question of fact" or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis.

Id. at 113-114 (citations omitted). In *Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1982), the Court commented on the "vexing nature of the distinction between questions of fact and questions of law", and in *Baumgartner v. United States,* 322 U.S. 665, 671 (1944), the Court characterized the distinction as "often not illuminating" and "never self-executing."

> statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

It is, of course, strictly the domain of Congress to determine and define the essential elements of any criminal offense. *See Blockburger v. United States,* 284 U.S. 299 (1932); *Missouri v. Hunter,* 459 U.S. 359 (1983); *United States v. Dixon,* 113 S.Ct. 2849 (1993); *United States v. Felix,* 112 S.Ct. 1377 (1992). As this Court stated in *Schad v. Arizona,* 111 S.Ct. 2491, 2500 (1991):

> Decisions about what facts are material and what are immaterial, or, in terms of *Winship,* 397 U.S., at 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court.

Accord: McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) ("*Patterson [v. New York, supra]* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive").

In *United States v. Rodgers,* 466 U.S. 475 (1984) this Court held that the term "jurisdiction" as used in 18 U.S.C. § 1001 to penalize false statements "in any matter within the jurisdiction of any department or agency of the United States," should not be given its "narrower, more technical meanings", but should be read in light of "[t]he most natural, non-technical reading of the statutory language" from Webster's Dictionary. *Id.* at 479-480.[19] The Court observed parenthetically that:

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[19] The Court of Appeals had dismissed the indictment, interpreting "jurisdiction" to exclude false statements to the FBI that the defendant's wife had been kidnapped, and that she was involved in a plot to kill the

> If the statute referred only to courts, a narrower construction of the word "jurisdiction" might well be indicated; but referring as it does to "any department or agency" we think that such a narrow construction is simply inconsistent with the rest of the statutory language.

Id. at 482. Applying the same principles of statutory interpretation to the term "materiality," it is equally appropriate to avoid interpreting that term in a highly technical way that "clashes strongly with the sweeping, everyday language" of the rest of the statute, for the same reasons set forth by this Court in *Rodgers*. *Id.* at 480. So construed, the issue of "materiality" can readily be interpreted and understood by jurors as a factual matter. *Cf. United States v. Persky,* 520 F.2d at 287 (holding that a "reasonable citizen" would have no difficulty interpreting terms such as "material fact" or "any omission to state a material fact").

It may well be, as some courts following the rationale of *Sinclair* have reasoned, that materiality in some contexts is "a judicially-imposed limitation to insure the reasonable application of the statute." *See United States v. Abadi,* 706 F.2d 180 n. 2, quoted in *Kungys v. United States,* 485 U.S. at 772; *see also United States v. Lichenstein,* 610 F.2d at 1278. But where Congress has designated materiality to be an essential element of an offense, as it has with false statement prosecutions brought pursuant to 18 U.S.C. § 1001, then the distinction between issues of fact and law have little relevance to the determination whether the element must be decided by the jury. *See United States v. Mentz,* 840 F.2d 315, 319-320 (6th Cir. 1988) ("Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence." "There can be little doubt that a trial judge commits error of constitutional magnitude 'when he instructs the jury as a matter of law that a fact essential to the conviction has been

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President, reasoning "that the investigation of kidnappings and the protection of the President are not matters 'within the jurisdiction' of the respective agencies, as that phrase is used in § 1001." 466 U.S. at 476-477.

established by the evidence, thus depriving the jury of the opportunity to make this finding.' "); *United States v. Whitehorse,* 807 F.2d 1426, 1430 (8th Cir. 1986) ("The issue rests not on a distinction between questions of law and questions of fact, but rather '[t]he issue is the role of the jury in the trial guaranteed to the accused.' ").

A fundamental defect of the Government's argument is evident from the circular reasoning in its discussion of legislative options:

> The post-*Winship* decisions actually support the validity of Section 1001's assignment of materiality to the court. It is clear from those decisions that Congress could have prohibited *all* false statements within the department or agency's jurisdiction, without regard to their materiality. Cf. *Patterson,* 432 U.S. at 209 (New York could have punished all intentional murders, without recognizing any affirmative defenses). Congress also could have punished all such false statements but made immateriality a defense. Cf. *ibid.* As a further alternative, Congress could have made immateriality a factor "affecting * * * the severity of the punishment," *id.* at 207, for consideration by the sentencing court. Cf. *McMillan v. Pennsylvania,* 477 U.S. 79, 85-86 (1986). In light of the options open to Congress, it is difficult to conclude that the one option foreclosed to it was assigning determination of materiality to the court.

Government's Brief at 39-40 (emphasis in original, footnote omitted). What the Government fails to acknowledge is that Congress *did* include materiality in the false statement statute, making it an essential element that must therefore be submitted to the jury. In *Patterson,* just the opposite occurred:

> We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is

> required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime.

432 U.S. at 205-206.[20]

Therefore, the power of the legislature is not the issue; it is how that power was exercised which determines whether the jury must decide the issue, and who bears the burden of persuasion. In this case Congress has chosen to include materiality within the definition of the crime, making it an essential element that must be proven beyond a reasonable doubt to the satisfaction of the jury. *Patterson, supra,* 432 U.S. at 210.

IV. PRECEDENT AND HISTORY DO NOT JUSTIFY AN EXCEPTION TO THE HISTORIC ROLE OF THE JURY IN DECIDING ALL ELEMENTS OF A CRIMINAL CHARGE BEYOND A REASONABLE DOUBT

The Government argues that this Court should construe "the constitutional right to a jury trial in light of the practices observed in criminal jury trials when the Constitution was

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[20] This is consistent with the holding of *Leland v. Oregon*, 343 U.S. 790 (1952), that the legislature can define offenses and designate affirmative defenses, even imposing upon the defendant the burden of proving the defense of insanity beyond a reasonable doubt.

This broad legislative power is not without limitation, however. This Court has indicated its willingness to invalidate legislative attempts to redefine an offense in any way that would circumvent the due process requirements of *Winship:*

> Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Mullaney v. Wilbur, 421 U.S. at 698. *Accord: Schad v. Arizona,* 111 S.Ct. at 2503.

ratified and in later years." Government's Brief at 28. However, a more compelling argument can be made that precedent and history dictate the elimination of this anomalous exception to the due process principle that juries must decide all facts in a criminal case beyond a reasonable doubt.

The origins of the right to a jury trial are sacred, both in this country and in England, for "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta." *Duncan v. Louisiana, supra*, 391 U.S. at 151. In 1765, Sir William Blackstone, whose works had an enormous influence in the United States as well as in England, referred to the English jury as the grand "palladium" of English liberty. 4 W.P. Blackstone, *Commentaries* * 350.

In *Duncan*, this Court articulated the importance of the constitutional right to a jury trial:

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

391 U.S. at 156. The Court explained that the "framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Ibid.* The inviolable separation of the roles of judge and jury is as old as the concept of the jury trial itself:

> The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The

> jury must in all cases determine the value and effect of the evidence. . . . The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect.

W. Forsyth, *History of Trial by Jury*, 235 (Morgan Ed. 1875).

The Government relies heavily upon the common law tradition of allowing judges to determine materiality in perjury cases to justify a glaring exception to the broad, historic principle, dating back to the Magna Carta, that the judge should have no part in deciding the facts of any case. However, this Court, in *Williams v. Florida*, 399 U.S. 78, 92 (1970), rejected the "assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."

In *Williams*, the Court examined the history of the constitutional provisions guaranteeing a jury trial, ultimately rejecting the defendant's argument that the Sixth Amendment required a twelve person jury because that was the practice at common law. *Id.* at 92. "While 'the intent of the Framers' is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Ibid.* The Court recounted the "very scanty history" of the provisions of Article III guaranteeing that "[t]he trial of all Crimes . . . shall be by jury," *id.* at 93, and the compromise version of the Sixth Amendment that emerged from the House and Senate, noting that several of the common law features were eliminated from the Sixth Amendment in the process. *Id.* at 93-97. The Court concluded

> there is absolutely no indication in the "intent of the Framers" of an explicit decision to equate the constitutional and common law characteristics of the jury. . . . The relevant inquiry, as we see it, must be the function that the particular feature performs in its relation to the purposes of the jury trial. Measured by this standard, the twelve-man requirement

> cannot be regarded as an indispensable component of the Sixth Amendment.

Id. at 99-100.

This discussion makes clear, contrary to the Government's assertions, that common law traditions, no matter how ancient (or antiquated), certainly need not be read into the Sixth Amendment. Rather, the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100. The most important purpose of the jury trial was described by the Court in *Williams* as follows:

> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. . . . And, certainly, the reliability of the jury as a factfinder hardly seems likely to be a function of its size.

Id. at 100-101. Applying these principles, the Court held:

> We conclude, in short, as we began: the fact that the jury at common law was composed of precisely twelve is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." *Duncan v. Louisiana, supra*, at 182 (Harlan, J., dissenting). To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions.

Id. at 102-103.

The Government's argument that the issue of materiality has traditionally been taken from the jury in other contexts

falls more neatly into the category of "historical accident" than fundamental purpose. This common law anachronism is squarely at odds with the fundamental purpose of the jury, "the interposition between the accused and his accuser of the common sense judgment of a group of laymen" to assure "the reliability of the jury as a factfinder." *Id.* at 100.

Finally, the Court in *Williams* made clear that legislatures should have the freedom to "have their own views about the relative value of the larger and smaller juries." *Id.* at 103. In this case, Congress has expressed its view that materiality is an essential element of the false statement statute, and should not be prohibited from doing so by reliance on common law traditions incorporated through the *Sinclair* dictum. As this Court recognized in *Williams*: "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id.* at 103.

A. The Extent of Due Process Protections, and of the Sixth Amendment Right to a Jury Trial Have Evolved Substantially Since this Court's Decision in Sinclair.

The Government observes: "As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." Government's Brief at 26, citing *Honda Motor Co. v. Oberg,* 114 S.Ct. 2331, 2339 (1994). However, the Court in *Oberg* also cautioned that "to hold all procedural change unconstitutional 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' " 114 S.Ct. at 2340, quoting *Hurtado v. California,* 110 U.S. 516, 529 (1884).

Almost without exception, each of the cases cited by the Government in support of this proposition involved the "fundamental fairness" rubric of the Fourteenth Amendment Due Process Clause, Government's Brief at 26-31, but such analysis is primarily utilized with federal challenges to state procedures, where "States must be permitted a degree of

flexibility." *Schad v. Arizona,* 111 S.Ct. at 2500.[21] In *Schad,* the court noted the limited value of history and tradition even in this context:

> This is not to say that either history or current practice is dispositive. . . . Conversely, "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." (citations omitted) In fine, history and current practice are significant indicators of what we as a people regard as fundamentally fair and rational ways of defining criminal offenses, which are nevertheless always open to critical examination.

Id. at 2502-2503 (internal quotations omitted).[22]

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[21] The Court in *Oberg*, and other cases cited by the Government for this proposition, *see* Government's Brief at 26-28, was concerned with due process challenges to state procedures, such as the prohibition of judicial review of punitive damage awards, the issue in *Oberg*. The analysis employed in such cases is of questionable relevance to the explicit, Sixth Amendment structural guarantee that a jury must decide the facts in a criminal case, for federal scrutiny of state procedures under the auspices of the Fourteenth Amendment Due Process Clause permits states to devise their own procedure unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Dowling v. United States,* 493 U.S. 342, 352 (1990); *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. at 798; *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

[22] This Court has repeatedly made clear that there are limits to such attacks under the Fourteenth Amendment:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Leland v. Oregon, 432 U.S. at 201. As noted by the Court in *Dowling v. United States, supra,* 493 U.S. at 352: "We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly."

In contrast to the limited nature of due process challenges to state procedures, the language of Article III, that "[t]he trial of all Crimes . . . shall be by Jury," and the language of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . " creates "a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.' " *Duncan v. Louisiana*, 391 U.S. at 156. As with other textual guarantees directly applicable to federal prosecutions, the role of history and tradition must give way to the explicit commands of the Bill of Rights. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("literal right to 'confront' the witness at the time of trial" described "as forming 'the core values furthered by the Confrontation Clause.' " citing *California v. Green*, 399 U.S. 149, 157 (1970)).

Moreover, the Government's suggestion that the full extent of the Sixth Amendment right to a jury trial has remained static since this Court's decision in *Sinclair* more than 65 years ago is clearly untenable, for *Sinclair's* foundation no longer rests on solid ground. The *Sinclair* holding, that "[i]t would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury," 279 U.S. at 299, relied on two earlier precedents, *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894) and *Horning v. District of Columbia*, 254 U.S. 135 (1920).

The *Brimson* case held there is no right to a jury trial in prosecutions for criminal contempt, a decision that has been effectively overruled by this Court in *Bloom v. Illinois*, 391 U.S. 194 (1968). In *Bloom*, the Court rejected a Government

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Accord: Medina v. California, 112 S.Ct. 2572, 2577 (1992) (a procedure must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" citing *Patterson v. New York,* 432 U.S. at 202. "Historical practice is probative of whether a procedural rule can be characterized as fundamental. See *ibid.*; *In re Winship,* 397 U.S. 358, 361 (1970).").

argument against the right to a jury trial for criminal contempt based upon "strong, though sharply challenged historical support," reasoning that "the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution." *Id.*, at 198-199 and n. 2.

The other case relied upon by the Court in *Sinclair, Horning v. District of Columbia, supra*, presents a compelling argument for abandoning the *Sinclair* dictum. The defendant in *Horning* had moved his pawnbroking business out of Washington, D.C., in anticipation of a newly enacted law making it illegal there, but he maintained a "free automobile service from there to Virginia" where the transactions continued, and he was eventually charged for violating the new law against pawnbrokers in the District of Columbia. 254 U.S. at 136. When the jury refused to return a prompt verdict, the judge recalled them to the courtroom and effectively ordered them to convict the defendant. *Id.* at 138. While conceding that "there was a regrettable peremptoriness of tone" in the court's instructions, the Court concluded that "[i]f the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt." *Id.* at 139 (citation omitted).

Not surprisingly, Mr. Justice Brandeis vigorously dissented, joined by the Chief Justice and Justice Day, reasoning "that the judge is without power to direct a verdict of guilty although no fact is in dispute." 254 U.S. at 139 (citations omitted). The dissent characterized the trial court's charge to the jurors as "a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury." *Ibid.* Justice Brandeis declared:

> Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution a mere formality. The offense here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. . . . Because the presiding judge usurped

> the province of the jury, I am unable to concur in the judgment of the court.

Id. at 140. Of course, the notion that the judge can direct a verdict in a criminal case has often been rejected in subsequent decisions of this Court. *See, e.g., Morissette v. United States, supra; United States v. United States Gypsum Co., supra*, 438 U.S. at 446; *Sandstrom v. Montana*, 442 U.S. at 520-524.

Numerous decisions make clear that this Court's interpretation of the right to a jury trial has not remained static since 1929, when *Sinclair* was decided. *See, e.g., Duncan v. Louisiana, supra* (first applied to the States); *Burch v. Louisiana*, 441 U.S. 130 (1979) (unanimity required for six person juries); *Bloom v. Illinois, supra*, and *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (jury required for criminal contempt); *United Mine Workers v. Bagwell*, 114 S.Ct. 2552 (1994) (jury required for criminal contempt *fine*); *Sandstrom v. Montana, supra*, and *Carella v. California, supra*, (use of traditional presumptions violates both due process and Sixth Amendment right to have jury decide every fact necessary for conviction).

B. None of the Other Circuit Court of Appeals Decisions Seriously Considered the Constitutional Implications of Allowing the Court to Decide Materiality.

The Government's answer to *Winship* and the Sixth Amendment cases discussed above is contained in the oft-stated refrain that, "[b]ecause materiality is a question of law rather than a question of fact, it need not be submitted to the jury." Government's Brief at 37. It is, of course, a truism that questions of law are generally reserved for the court, such as preliminary determinations concerning the admissibility of evidence, the example cited in the Government's Brief. *See*

Fed. R. Evid. 106.[23] But the simplistic syllogism that "materiality is a question of law, therefore judges should decide it," does little to address, much less justify this glaring exception to the Fifth and Sixth Amendments.

The vast majority of cases from other circuits make no mention of *Winship* or the Sixth Amendment cases discussed above, but simply recite the dictum of *Sinclair*, a case involving prosecution for contempt of Congress that predates *Winship* and its progeny by more than four decades. *See* n. 1, *supra*.

The only two circuit court of appeal cases that even mention this Court's decision in *Winship* distinguish its rationale with the dubious assertion that "a sound argument might be made that materiality is a 'historical exception' to the general due process mandate of *Winship* that each essential element of the crime charged must be submitted to the jury." *United States v. Daily*, 921 F.2d 994, 1003-1006 (10th Cir. 1990) (citation omitted). The reasoning from *United States v. Abadi*, *supra*, is equally suspect:

> We do not believe that the materiality requirement should be treated as an "element" of 18 U.S.C. § 1001 in the sense that the prosecution must prove materiality beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970); *cf. United States v. Giacalone*, 587 F.2d at 7. Instead, we view the materiality requirement as a judicially imposed limitation to insure the reasonable application of the statute. Thus, the district court is required to find, as a matter of law, that the

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[23] The Federal Rules of Evidence provide a comprehensive guide for trial judges governing evidentiary rulings such as relevance (Article IV), privilege (Article V), expert and opinion testimony (Article VII), and hearsay (Article VIII). *See Daubert v. Dow Chemical Co., Inc.*, 113 S.Ct. 2786 (1993). However, the rules of evidence are specifically subject to constitutional limitation. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974) (confrontation); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (due process); *Rock v. Arkansas*, 483 U.S. 44 (1987) (constitutional right to testify).

> false statement or representation is material in a prosecution under section 1001.

706 F.2d 178, 180, fn. 2 (6th Cir. 1983), cited in *Kungys*, 485 U.S. at 772. As discussed above, *supra* at 34-39, materiality is an essential element, included by Congress in the definition of 18 U.S.C. § 1001, not a "judicially imposed limitation."

V. CONCLUSION

This Court commented in *United Mine Workers v. Bagwell*, *supra*, that "[t]he use of a civil process for contempt sanctions 'makes no sense except as a consequence of historical practice.'" 114 S.Ct. 2565 (quoting *Weiss v. United States*, 114 S.Ct. 752, 771 (1994) (Scalia, J., concurring in part and concurring in judgment). This same appraisal accurately describes the practice of allowing judges to decide the issue of materiality, for the vast majority of cases from the other circuits have simply recited the antiquated dictum of *Sinclair* to justify their holdings, and *Sinclair's* viability is questionable, or at best inapposite where the issue of materiality is an essential element of a criminal offense.

The vice of this anachronistic practice lies not only in the irreconcilable and indefensible conflict it has created with modern statutes criminalizing bank fraud, wire fraud, mail fraud, and securities fraud, where the jury routinely decides the issue of materiality; it also does violence to

the most basic constitutional principles of due process and the fundamental right to a jury trial in criminal cases.

Accordingly, the decision below should be affirmed.

Respectfully Submitted,

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